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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|----------------------|-------------|----------------------|---------------------|------------------|
| 10/624,062 | 07/21/2003 | Jeffrey Hutchinson | RWB-040US1 | 5170 |
| 31344 | 7590 | 02/28/2007 | EXAMINER | |
| RATNERPRESTIA | | | TRAN LIEN, THUY | |
| P.O. BOX 1596 | | | ART UNIT | |
| WILMINGTON, DE 19899 | | | PAPER NUMBER | |
| | | | 1761 | |

| SHORTENED STATUTORY PERIOD OF RESPONSE | MAIL DATE | DELIVERY MODE |
|--|------------|---------------|
| 2 MONTHS | 02/28/2007 | PAPER |

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/624,062
Filing Date: July 21, 2003
Appellant(s): HUTCHINSON ET AL.

MAILED
FEB 28 2007
GROUP 1700

Costas S. Krikelis
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 11/20/06 appealing from the Office action mailed 10/31/05.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

| | | |
|-----------|------------|--------|
| 5,130,150 | AVERBACH | 7-1992 |
| 5,804,243 | LOH et al. | 9-1998 |

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WO98/30105

LONERGAN et al

7-1998

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-12 and 15-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lonergan et al (WO 98/30105) in view of Averbach.

Lonergan et al disclose a glaze comprising 10-80% edible oil; this glaze is coated on dough products to impart a fried surface texture to the products when they are baked. The application of the glaze to the dough products, followed by baking mimics the frying step which is traditionally used in the production process of certain dough products. The unbaked dough product may be any unbaked dough product to which it is desirable to impart a fried texture without a frying step. The dough product may a pizza

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crust, doughnut, beignet, tortilla etc... The particular edible oil or combination of edible oil is not critical and is chosen on basis of convenience and desired flavor. Suitable oils include soy oil, peanut oil, olive oil etc. (See pages 2-6)

Lonergan et al do not disclose a yeast-raised doughnut, coating with a second coating comprising a fat after cooking, spraying when the baked dough is still warm, spraying within 3 minutes after baking

Averbach discloses an edible moisture barrier. The barrier comprises about 98% fat and no more than about 5% of edible waxes. The barrier is used to inhibit moisture migration through a surface of a food product. The food product may be cooked by baking and includes baked goods such as doughnuts, cookies, etc. Suitable oils include palm oil, soy oil. A combination of oils can be used. (see col. 3)

The language "consisting essentially of" in claims 2,3, 15,19 does not define over the prior art because the instant specification does not recognize the criticality of excluding the additional components in Lonergan et al. Furthermore, as cited in claim 5, the coating comprises at least 80% by weight fat and Lonergan et al disclose 80% fat. It would have been obvious to one skilled in the art to make a yeast-raised doughnut following the Lonergan et al teaching to obtain a low fat doughnut. Lonergan et al disclose doughnut which would include both cake doughnut and yeast-raised doughnut. Lonergan et al disclose the process is applicable to any dough product which it is desirable to impart a fried texture without a frying step. The composition and steps of forming yeast-raised doughnut are well known in the art as shown by applicant on

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page 1. It would have been obvious to one skilled in the art to apply a moisture barrier as taught by Averbach to the product after baking to obtain the moisture barrier function and benefits taught by Averbach. Averbach teaches the barrier can be used on doughnut. It would have been obvious to one skilled in the art to heat the coating composition to facilitate the coating process. It would have been obvious to coat the product soon after baking to making the coating process easier because the fat coating can easily melt into the warm product. It would have been within the skill of one in the art to determine the coating parameters which would give the most optimum product.

Claims 13-14 and 21-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lonergan et al in view of Averbach as applied to claims 1-12 and 15-20 above, and further in view of Loh et al.

Lonergan et al do not teach baking with steam.

Loh et al disclose a process for making low-fat cake donuts; the donuts are baked. They teach to inject steam into the oven during at least the first half of the baking cycle to maintain surface moisture of the dough in order to prevent undesirable crust formation during baking which might preclude proper expansion and structure formation. (See col. 3 lines 25-35)

It would also have been obvious to apply steam during the baking to obtain the benefit taught by Loh et al. The duration of the steam can be determined by one skilled in the art through experimentation.

(10) Response to Argument

On page 8 of the appeal brief, appellant argues the rejection fails to consider the invention as a whole. This argument is not persuasive. The examiner fails to gasp what appellant considers as failing to consider the invention as a whole. Appellant argues Lonergan et al do not provide one sentence in which they mention that the process is also applicable to other material including inter alia doughnuts. This argument is clearly not supported by the Lonergan et al. disclosure. On page 4 lines 1-4, Lonergan et al explicitly disclose " the dough product may be a pizza crust, doughnut, beignet, tortilla etc...". Clearly, the Lonergan et al method is not limited to just frozen pizzas. Lonergan et al also disclose on the same page, " formulations of each of the above listed unbaked dough products are well known and are available to the public in commercial cookbooks". This disclosure clearly suggests that any known dough formulation can be used and it is not a critical aspect of the method. Appellant argues that in using the Averbach reference, the examiner splits the process steps without regard to the invention as a whole. It is unclear what appellant means by splitting the process. The application of the Averbach fat coating takes place after the dough product is cooked. Contrary to appellant's assertion, it has everything to do with the claimed process because the claimed process requires a step of applying a fat coating after the product is cooked and this is exactly what Averbach teaches. Appellant argues on page 10, the coating as taught by Averbach does not alter the texture and taste of the doughnut. Averbach disclose that the coating is applied to doughnut to inhibit moisture migration; it is useful in preventing moisture from entering or existing the product. The lost of moisture from a doughnut will cause it to become dry and stale; the

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entering of moisture into doughnut from the environment will cause it to be soggy.

Thus, how can applying the coating not alter the texture and taste of the doughnut?

Furthermore, the claims do not recite any functional limitation to the second fat coating.

It is only necessary to show why such step would have been obvious to one skilled in the art in view of the prior art. The prior art to Averbach provides the motivation for why one skilled in the art would apply the second fat coating. The Lonergan's objective is to provide a baked product that mimics a fried product. The Averbach's objective is to enhance stability and consequently the taste and texture of the product. Combining the two teachings to give the most optimum product would have been obvious to one skilled in the art, particularly in view of the fact that Averbach teaches to apply the coating to the same product that is disclosed in Lonergan.

On page 11 of the appeal brief, appellant argues Lonergan et al do not teach the step of applying a cooking fat to a proven dough. This argument is not persuasive. The gist of the Lonergan et al teaching is to apply the glaze to dough mixture which dough mixture is typically subjected to a frying step; the application of the glaze eliminates the frying step but mimics the organoleptic properties of product that is subjected to a frying step. The dough products that are suitable for use include any dough products in which the organoleptic properties of fried product is desired and doughnuts are disclosed as one of the dough products. The disclosure of doughnut readily suggests to one skilled in the art both cake donut and yeast raised donuts because those are the two forms of donuts known in the art as pointed out by applicant. When using the glaze, it would have been readily apparent to one skilled in the art to

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prepare the dough product according to known method in the art. Lonergan et al disclose formulations of the unbaked dough products are well known and readily available in commercial cookbooks. Thus, when using the glaze on the dough product, it would have been readily apparent that the formulation and processing parameters of the dough product do not change. The glaze is applied to the surface of the dough product; it is not mixed into the dough. The entire disclosure of Lonergan et al clearly indicates that proofing can take place depending on the nature of the dough product. For instance, Lonergan et al disclose on page 5 the dough contains yeast; the presence of yeast indicates that the dough will be proofed. Page 11 discloses a pizza dough containing yeast and page 12 discloses the dough is fermented for 1 hour and then proofed for about 10 minutes. Thus, Lonergan et al do not teach against proven dough; whether or not the dough will be proofed depends on the type of dough product made. When using the glaze on a yeast- raised donut, it would have been obvious to proof the dough because that is the conventional way of making the yeast-raised donut. Appellant repeatedly argues on page 12 that the increase in size by using the glaze eliminates the need to proof. This is a conclusion drawn by appellant not by the disclosure. Lonergan et al do not disclose anywhere that the use of the glaze eliminates the need to proof. In fact, the disclosure on page 12 recites the exact opposite. Whether the dough is proofed or not depends on the type of dough. On page 13, appellant argues the disclosure on page 12 of proofing for about 10 minutes is not proofing but a commonly used step known in the art as resting the yeast. This argument is not supported by factual evidence. The time of proofing varies with the

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type of dough and parameters such as temperature, size, relative humidity. Appellant's claims do not define any proofing parameters. Appellant does not have any evidence to refute the Lonergan et al disclosure.

On page 14 of the appeal brief, appellant urges that proven dough cannot be frozen and then baked, or frozen, defrosted and then baked because yeast is a live organism and is significantly compromised by cold. This urging is not backed up by factual evidence. Appellant has not submitted authoritative text or testing to show that proofed dough cannot be frozen or refrigerated. Appellant mentions that part-baked frozen doughs are available, but not frozen unbaked ones. The examiner respectfully disagrees with this statement. There are also unbaked dough products such as pizza dough, bread dough, croissant dough that are not baked and all of these doughs are proofed. Furthermore, appellant's argument tends to ignore one significant fact disclosed in Lonergan et al. The dough product in Lonergan et al does not have to be subjected to freezing or refrigerating. Lonergan et al disclose the glaze is also applied to fresh dough product (see page 4 line 4). Thus, even if appellant's argument about proofed dough cannot be frozen is persuasive, it would not have been sufficient to overcome the reference.

On page 15 of the appeal brief, appellant argues the Averbach teaching is not a process step that is a substitute for the steps required to achieve the desired fried texture. It is not suggested in the rejection to substitute the Averbach teaching for steps required to achieve desired fried texture. Lonergan et al already teach a coating to obtain the desired fried texture. However, it would have been obvious to add

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the Averbach coating to the Longergan et al product after it is cooked to obtain the moisture protection disclosed by Averbach. This is especially advantageous in donuts because donuts are usually subjected to sugar glazing or chocolate coating. Appellant argues Averbach does not teach applying the coating of cooking fat while the dough is still warm. The time of application can change depending on the continuity of the process. It would have been obvious to one skilled in the art to apply the barrier coating as the donuts exist the oven to keep the process continuous and also the coating will melt more easily into the surface of the dough while the donuts are still warm. The time of application is a result-effective variable which is within the determination of one skilled in the art. For example, in a continuous process, one would not leave off applying the coating after the donuts exist the oven because that will break the continuity of the process and causes delay in the production process. On page 16 of the appeal brief, appellant argues this rationale is not supported and is speculative. The examiner respectfully disagrees. Averbach does not place any restriction on the time of application. Thus, it would have been within the skill of one in the art to determine such parameter. It is not speculative to want to maintain the continuity of the process and it is not speculative to want to apply fat to product that is warm. This is an experimental factor to determine the most optimum working condition that would give the most optimum working parameter and product. Optimization is within the skill of one in the art. For example, in applying fat coatings such as margarine, oil, butter to bread, one would apply such coating to toast right after toasting or to baked product after baking. On page 17, appellant states that the glaze will melt and penetrate the doughnut mass

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as suggested by the Examiner. This is not a totally accurate characterization of the statement. The rejection states that the coating will melt more easily onto the surface of the donuts not penetrating the doughnut mass. On page 17, appellant points to the Silva et al reference (US patent no. 4293572) to show that the surface temperature of the doughnut at the time of application of the coating should be between 90-100 degree F. The Silva reference is not used in the rejection. However, this reference supports the position that one skilled in the art would not apply a coating to cooled products because 90-100 degree F can be considered warm; it is definitely not cool.

On pages 18-19 of the appeal brief, Appellant argues the suggestion to combine is lacking because it would simply not be logical to one skilled in the art to add a further process step to the Lonergan's process that will retain excess moisture in the doughnut. The basis of this argument is not understood. There is no disclosure or evidence to suggest that the products in the Lonergan process would be wet or soggy. The glaze is applied to the food products to mimics the fried texture, not to increase the moisture content. Appellant does not have any evidence to show that the product is soggy or wet. The glaze in Lonergan can include 20% water and 80% oil; thus, the glaze does not contain a substantial amount of water. The barrier layer disclosed by Averbach would be beneficial to the Lonergan et al product because it prevents moisture migration. The barrier will prevent moisture from entering or existing the product. This will prevent the product from drying out; whatever moisture that is originally present will be maintained. The product will not be become soggy from outside moisture. The

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texture and taste of the product will be improved; one would be motivated to add the barrier layer for this reason.

On page 20 of the appeal brief, appellant argues the language "consists essentially of" exclude the other components disclosed in the coatings of Lonergan et al and Averbach. The examiner respectfully disagrees. Section 2111.03 of the MPEP states "for the purposes of searching for and applying prior art, absent a clear indication in the specification or claims of what the basic and novel characteristics actually are" consisting essentially of" will be construed as equivalent to" comprising". If appellant contends that additional materials in the prior art are excluded by the recitation of" consisting essentially of", appellant has the burden of showing that the introduction of the additional components would materially change the characteristics of applicant's invention. Appellant argues that the term consisting essentially of is defined in the specification as consists only of fat or oils. Page 7 of the specification states "consists essentially of cooking fat indicates that the formulation consists only of fats of fat or oil". The specification does not explicitly defines what consisting essentially of include or exclude. The language has precise meaning in claim interpretation. If appellant claims consisting essentially of, it cannot mean consisting of. Furthermore, line 23 of page 7 discloses the fat comprises at least 80% fat and small amounts of water may be present. Thus, the fat composition includes formulation comprising 80% fat and 20% of other components. There is no recognition that the inclusion of the wax as disclosed in Averbach would materially change the claimed fat coating. As set forth above, the use of the moisture barrier as taught by Averbach will improve the taste and texture of the

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doughnut because it prevents the product from drying out or becoming soggy from outside moisture.

On page 22 of the appeal brief, appellant argues one would not look to Loh et al to make yeast raised doughnut that tastes like fried dough. It is not necessary for one to look to Loh et al for this teaching because Lonergan et al already teach a process of making doughnut which is baked to taste like fried doughnut.. Lonergan et al teach subject the dough product to baking instead of the traditional frying for such products. The products includes donuts. Loh et al teach baking donuts and they are baked with the injection of steam to prevent undesirable crust formation during baking which might preclude proper expansion and structure formation. It would have been obvious to bake in the presence of steam as taught by Loh et al to obtain proper expansion and structure formation of the product. Appellant only combines known steps as shown in the prior art without showing of any unexpected result. The use of fat coating to mimic fried product is known as shown by Lonergan et al, the use of fat coating on already baked product to improve texture and taste by preventing moisture migration is also known as shown by Averbach and the use of steam during baking to obtain proper expansion and structure formation is known as shown by Loh et al. To combine all three features to obtain baked product that resembles fried product in taste and texture would have been obvious in view of the teaching of the prior art.

(11) Related Proceeding(s) Appendix

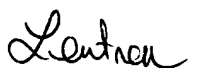
No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Lien Tran


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